Supreme Court, U.S.
FILED

No. 091129 MAR 16 2010

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In the

Supreme Court of the United States

TIMOTHY CONRAD REHAK
AND MARK PAUL NAYLON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHERE PETITIONERS WERE ACCUSED OF CONSPIRACY TO DEPRIVE VINCENZO PELLIGATTI OF HIS PROPERTY RIGHT TO DUE PROCESS, 18 U.S.C. 241, WHERE MR. PELLIGATTI DID NOT EXIST AND BY COURT AUTHORIZED WARRANT HAD NO LEGAL INTEREST IN "HIS" MONEY, DID THE TRIAL COURT'S REFUSAL TO DEFINE WHAT "DUE PROCESS" MEANS AND THAT INDIVIDUAL IS NOT DEPRIVED OF IT IF HE HAS AVAILABLE A POST-DEPRIVATION REMEDY CONSISTENT WITH PARRATT AND HUDSON, DENY PETITIONERS THEIR OWN DUE PROCESS RIGHT TO A FAIR TRIAL?

II. DOES THE FEDERAL THEFT STATUTE, 18 U.S.C. 641, PERMIT CONVICTION FOR TEMPORARILY TAKING MONEY PURSUANT TO WARRANT WHICH IS FULLY ACCOUNTED FOR, CONSISTENT WITH MORISSETTE V. UNITED STATES AND UNITED STATES V. LEON?

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2009

TIMOTHY CONRAD REHAK AND
MARK PAUL NAYLON,

PETITIONERS,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The Petitioners, Timothy Conrad Rehak and Mark Paul Naylon, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

LIST OF PARTIES

Timothy Conrad Rehak and Mark Paul Naylon, the Petitioners.

United States of America, the Respondent.

OPINION BELOW

United States v. Rehak, 589 F.3d 965 (8th Cir. 2009).

STATEMENT OF JURISDICTION

The Eighth Circuit Court of Appeals handed down its decision on December 22, 2009. This petition is timely filed, within ninety days. Jurisdiction of this Court is conferred by 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION

The Fifth Amendment provides, in part, that no defendant shall ". . . be deprived of life, liberty or property without due process of law . . ."

STATUTES

18 U.S.C. Sec. 241 provides, in part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . .
>
> They shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. Sec. 641 provides, in part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States . . . .

> Whoever receives, conceals, or retains the same with intent to convert it to his own use or gain, knowing it to have been embezzled, stole, purloined or converted –
>
> Shall be fined under this title or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

The Petitioners were convicted of conspiring to violate the civil rights of a person who didn't exist, and of temporarily stealing government funds, seized pursuant to a valid warrant, which were fully accounted for and then forfeited.

By the summer of 2004, Petitioner Timothy Conrad Rehak (Officer Rehak) had served eighteen years on patrol with the St. Paul Police Department. (T. 325, 371). Shawn Arvin was a drug addict, petty crook, a sometime informant Officer Rehak had used for more than ten years. (T. 369). In early 2004, Arvin had been arrested on federal drug charges. He was facing a minimum of ten years, seventeen on the high end. (T. 779, 857). In order to cut his time, Arvin met with the FBI on May 10, 2004, and offered to record Officer Rehak. (T. 706).

The First Integrity Test

On November 3, 2004, F.B.I. agents placed $13,500.00 inside Room 503, of the Kelly Inn hotel in St. Paul. (T. 78, 506; Govt. Exh. 10). A camera was installed, but it did not record the sound. (Govt. Exh. 12; T. 180). The Kelly Inn records indicated that the room was rented to Vincenzo Pelligatti from 5801 Whipple, Chicago, Illinois, 60624; he owned a Lexus

automobile with an unidentified Illinois plate, no date of birth given (T. 136, 874). The Government conceded Pelligatti didn't "even exist." (T. 975). The fictional Pelligatti was to check out the following day. (T. 135).

Shawn Arvin told Officer Rehak that "Vinnie" had been recently "arrested" in Wisconsin, and was attempting to retrieve his money and drugs from the Kelly Inn. (T. 775-767; Govt. Exh. 6). Officer Rehak responded that he'd attempt to find the contraband. (T. 924). On the way to the hotel, Rehak called Petitioner Mark Paul Naylon (Mr. Naylon), who worked for the Ramsey County Sheriff's Special Investigations Unit. (T. 82-83, 470). Their supervising Sergeant, Rollie Martinez, was contacted to assist. (T. 473).

When the Kelly Inn desk clerk declined a request to search the room, Sergeant Martinez left to obtain a warrant. (T. 137). Upon his return, the Petitioners and Sergeant Martinez entered at 3:38 P.M.. (T. 463). The video showed Officer Rehak taking a duffel bag from a dresser, in which he discovered the F.B.I.'s $13,500.00. (T. 86). At 3:39 P.M., Officer Rehak handed several packets of bills to Mr. Naylon, who had motioned for the money and who then placed $6,000.00 in his right coat pocket. (T. 88, 104).

The initial search inventory indicated that $7,500.00 had been taken from the room. (T. 183, 186). That number omitted the $6,000.00. (T. 350-354).

After the search, law enforcement databases were queried to determine whether Pelligatti had a criminal record in Minnesota, Illinois, Indiana or Wisconsin; the FBI's data base was also checked. (T. 400-410).

Though such checks are an essential part of police work, there is no guarantee of success. Aliases are often used. The suspect may not be in a database because of lack of criminal justice contact. (T. 325, 442, 445).

An authentic Vincenzo Pelligatti, say, may never have been arrested in Illinois, or Indiana. He may not have had a Minnesota license. No confirmation of him was found anywhere. (T. 411).

Later in the evening of November 4th, Officer Rehak and Naylon called Sergeant Martinez to inform him that an extra $6,000.00 has been discovered inside the hotel room. Martinez suggested the $13,500.00 be stored and documented the following business day. (T. 191-92).

When Arvin called to discuss the search and its fruits, Officer Rehak told him the entire $13,500.00 was recovered. (T. 792). On a contemporaneous report, Officer Rehak indicated that "inside this bag I recovered thirteen thousand five hundred dollars." (T. 798, 894, 898). All of the Kelly Inn funds were inventoried at the Ramsey County Sheriff's office. (T. 197). The search warrant return was changed to reflect the total amount seized. (T 1098; Govt. Exh. 14).

Later that fall of 2004, the F.B.I. asked another federal agency to recount the money. Not a dollar was missing. (T. 903, 907).

Still later, a Ramsey County forfeiture specialist Anne Cardenas obtained a report of the search and initiated a successful forfeiture. No claim was filed on Pelligatti's behalf. (T. 686-688, 908; Govt. Exh. 19).

The second test

After a six month pause, a second integrity test was conducted in mid-July 2005. (T. 802). An out-of-state vehicle had been stolen, Arvin told Officer Rehak, linked to a drug dealer/car thief in St. Paul named "Joey." (T. 806). The F.B.I. had parked a stolen car with Illinois plates, placing inside a duffle bag filled with drug wrappings and cash. (T. 803). The clandestine video feed featured sound this time. (T. 517, 803).

Officer Rehak found the car, had a data base check run and set up surveillance in order to catch the driver if he could. (T. 812). Arvin repeatedly insisted there would be a large quantity of narcotics in the abandoned car. (T. 819, 936, 948). After two days, Petitioners opened the car door and found the bag with money inside, along with the narcotics wrapping materials. (T. 520; Govt. Exhs. 43A, 48). Mr. Naylon suggested to Officer Rehak that the lack of dope might have meant a set up. (T. 564).

Every dollar of the $7,880.00 was inventoried, claimed by no one and then forfeited. (T. 731, 735).

The trial and appeal

On March 4, 2008, Petitioners were charged by the Grand Jury with six counts of Wire Fraud (deprivation of honest services), 18 U.S.C. 1343 and 1346; Theft of Government Funds, 18 U.S.C. 641 (Count 7), and Conspiracy to Violate Civil Rights, 18 U.S.C. 241 (Count 8). Docket Entry 1.

Defense motions for dismissal of Counts 7 and 8 were argued pretrial (Docket Entries 23 and 24) and renewed at the close of evidence. (Docket Entries 49, 55, 56; T. 971). "The last count, your Honor, is this conspiracy to deprive someone of their due

process rights to property, but that person doesn't even exist." (T. 975). At a pretrial hearing, district court Judge Patrick Schiltz expressed hesitation as to the theft count. "The issue of whether 18 U.S.C. 641 requires – whether you can violate it by temporarily taking something . . . I just don't know the answer to that." (July 10, 2008 hearing, p. 62).

In its opening statement, the government didn't explicate the civil rights violation. In closing, the government argued: "One of the civil rights is the police don't get to take your property without due process of law. Police can't steal property. But civil rights of citizens meant nothing, if anything to these defendants." (T. 1303). "And once in the room they steal the money. They deprive without due process of law. In this country that violates our constitution, our civil rights." (T. 1304). Pelligatti's precise "civil right" was left unexplained.

In rebuttal, the government defended it this way: "They can't take property without due process just to do whatever they want with it." And, "[t]his is not upholding the constitution." (T. 1388).

Regarding the theft count, the government argued there must be proof of an intent to deprive "the owner's use or benefit of the money, that is Mr. Pelligatti." (T. 1305). The Indictment listed the United States as the owner. Docket Entry 1.

The district court's jury instructions did not define the constitutional right of due process. Regarding the elements of theft, Petitioners requested that the jury make a distinction between the temporal and permanent, and that the theft itself had to be permanent. (Defense Requests 41 and 49).

The jury acquitted on the Counts 1-4, the Court on Counts 5 and 6. The jury convicted on Counts 7 and 8. (Docket Entry 101). On September

12, 2008, the District Court denied the defense motions for a new trial. Docket Entries 103 and 122. Officer Rehak was sentenced to thirty-five months in prison, ordered to pay a $7,500.00 fine and a special assessment of $200.00. Mr. Naylon received a thirty-month term, with the same fine and assessment. (Docket Entries 131, 133). Judgments were entered on the 9th of February, 2009.

On appeal, Petitioners raised several issues. Two remain here. The Circuit rejected Petitioners' claim that the due process violation had to be defined for the jury, the violation itself cabined by Parratt v. Taylor, 451 U.S. 527 (1980), Daniels v. Williams, 474 U.S. 327 (1986) and Hudson v. Palmer, 468 U.S. 517 (1984). These cases, the Circuit held, were "inapposite here, where the focus is on the defendant's agreement, not the victim's damages." Rehak, 589 F.3d at 972.

The Petitioners raised the related issue of whether a civil rights conspiracy could be proven where its object was not a "person" within the meaning of 18 U.S.C. Sec. 241. Even if Pelligatti had existed, Petitioners claimed, there was no protected property right impacted when police search pursuant to a court authorized warrant.

The Circuit's ruling:

> The fact that Pelligatti was fictitious was unknown to [Petitioners]. This circumstance prevented them from actually violating a person's due process rights. While it was factually impossible to violate his rights, defendants were charged and convicted of conspiring to violate his rights. The crime was committed upon their agreement to steal his

> money. That they were unsuccessful is irrelevant to their culpability for conspiring.

Rehak, 589 F.3d at 971.

The Petitioners also argued that the theft conviction conflicted with the teaching of Morissette v. United States, 342 U.S. 246 (1952). Morissette held that "[p]robably every stealing is a conversion, but certainly not every conversion is stealing." Id. at 271. The Circuit read Morissette broadly: the theft statute "reaches all instances where 'one may obtain wrongful advantages from another's property.'" Id. at 973 (quoting Morissette, 342 U.S. at 271). The Circuit offered no constraint whatsoever, holding "Section 641 prohibits both permanent and temporary takings." Id.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. WHERE PETITIONERS WERE ACCUSED OF CONSPIRACY TO DEPRIVE VINCENZO PELLIGATTI OF HIS PROPERTY RIGHT TO DUE PROCESS, 18 U.S.C. 241, WHERE MR. PELLIGATTI DID NOT EXIST AND BY COURT AUTHORIZED SEARCH HE HAD NO LEGAL INTEREST TO KEEP "HIS" MONEY, DID THE TRIAL COURT'S REFUSAL TO DEFINE "DUE PROCESS" AND THAT AN INDIVIDUAL IS NOT DEPRIVED OF IT IF HE HAS AVAILABLE A POST-DEPRIVATION REMEDY CONSISTENT WITH PARRATT AND HUDSON, DENY PETITIONERS THEIR OWN DUE PROCESS RIGHT TO A FAIR TRIAL?

There can be no conspiracy to deprive a "person" who doesn't exist, of a constitutional right that he doesn't have.

"Conspiracy is an inchoate crime, the essence of which is an agreement to commit an unlawful act." Ianelli v. United States, 420 U.S. 770, 777 (1995). The agreement to commit the unlawful act is "a distinct evil," whether or not "the substantive crime ensues." Salinas. v. United States, 522 U.S. 52, 65 (1997). See also United States v. Feola, 420 U.S. 671, 694 (1975) (a conspiracy can be proven "regardless of whether the crime agreed upon actually is committed.").

The right to due process is only triggered, though, if there is at stake a "protected interest." Davidson v. Cannon, 474 U.S. 344, 348 (1986). The money inside the Kelly Inn belonged to the government before Petitioners could conspire to take

it. Sec. 241 protects a "person" not a phantom, and Pelligatti's "right" to keep the money was extinguished by the Court authorized warrant.

Who owned the Kelly Inn drug money is not in doubt. For example, in Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989), this Court held that

> In [21 U.S.C. § 853 (c), the civil-forfeiture counterpart to § 881], the so-called "relation-back provision", Congress dictated that "[a]ll right, title and interest in property" obtained by criminals via the illicit means described in the statute "vests in the United States upon commission of the act giving rise to the forfeiture." [citation omitted] . . . [T]he "taint theory," is one that "has long been recognized in forfeiture cases."
>
> * * *
>
> In sum, § 853 (c) reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture.

Id. at 627.

Following Caplin's logic, there can be no deprivation of a "right" to keep money tainted by drugs. That money is the government's.

Failing to cite Caplin and its progeny, the Eighth Circuit nonetheless disagreed. "Even if defendants believed the money was forfeitable, agreeing to convert it to personal use, rather than following forfeiture procedures, is sufficient for conviction under 18 U.S.C. Sec. 241." Rehak, 589 F.3d at 971. The Circuit's decision omits mention,

however, that the Minnesota statutory procedures were followed; the money taken in both seizures was properly forfeited. (T. 689, 735).

Instead the Circuit cited United States v. McClean, 528 F.2d 1250 (2nd Cir. 1976). McClean featured New York City narcotics officers who shook down drug dealers, keeping their money and never subjecting the same to a forfeiture proceeding. Id. at 1252-53. The jury in McClean convicted not on a Sec. 241 theory, rather the general 18 U.S.C. 371 charge. Id. at 1255. As noted, the Minnesota forfeiture laws were followed. And unlike here, McClean featured police officers who ignored the Fourth Amendment's warrant requirement, simply invaded private homes and robbed the occupants. Id. at 1253. They were not heard on the telephone, as was Officer Rehak, describing how all the money was accounted for. (T. 792).

Though argued, the Eighth Circuit also made no effort to distinguish or discuss Justice Breyer's opinion in United States v. Maravilla, 907 F.2d 216 (1st Cir. 1990), requiring a real person, i.e., the "inhabitant" described in the companion statute, 18 U.S.C. 242 (1990), to be the object of a civil rights deprivation. The victim in Maravilla was a Dominican male who didn't live in the United States, i.e, he was not an "inhabitant" as defined. He was deprived of due process by United States Customs officials but did not qualify for protection under the statute. Id. at 223-228. The same holding appears in United States v. Gaggi, 811 F.2d 47, 58 (2nd Cir.), cert. denied, 482 U.S. 929 (1987).

The case law interpreting Sec. 241 speaks of the Statute's protection of the "citizen," the "person," the "individual." See generally Wilkins v. United States,

376 F.2d 552, 560 (5th Cir.), cert. denied, 389 U.S. 964 (1967) (summarizing). The government conceded, through Arvin, that Pelligatti had left the hotel room, wasn't coming back and had abandoned his property. Thus no standing could ever be established to contest the seizure. Abel v. United States, 362 U.S. 217, 241 (1960). Without a recognized right, no Fourth Amendment protection is available. Hudson v. Michigan, 547 U.S. 586, 591 (2006).

Petitioners were clothed in good-faith, a doctrine that in practical effect forgives police error in favor of upholding the search by Court order. See United States v. Leon, 468 U.S. 897, 914-15 (1984). Petitioners seized what the warrant directed and acted within its scope. Id. at 920. The subsequent changes to the inventory return – correcting the amount taken – is a record keeping error at best, the kind of error that does not a Constitutional violation make. Herring v. United States, 129 S.Ct. 695, 703 (2009).

In the civil law setting, police officers who search pursuant to a warrant are given qualified immunity. Pearson v. Callahan, 129 S.Ct. 808, 821-22 (2009). Here they are in prison.

There is no Sec. 241 case that holds Mr. Pelligatti's non-existent right to "due process" comes to life by way of tautology. To say Mr. Pelligatti has been denied due process doesn't mean that he was.

The District Court's instructions left the concept of due process open for the jury to define, wrongly so. The due process property right has been explained in Parratt v. Taylor, 451 U.S. 527 (1980), Daniels v. Williams, 474 U.S. 327, 329 (1986) and Hudson v. Palmer, 468 U.S. 517 (1983). In Parratt, Justice Rehnquist emphasized that not every taking is a due process violation. 451 U.S. at 508.

> It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against 'State' deprivations of property; in the latter situation, however, even though there is action 'under color of' state law sufficient to bring the amendment into play, the state action is not necessarily complete. . . .
>
> We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.

Id. at 543 (quoting Bonnor v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975), modified en banc, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932 (1978)).

Justice Rehnquist then turned to the "proper manner" with which to decide due process deprivation. Id. at 542. Although the inmate plaintiff "ha[d] been deprived of property under color of state law, . . . [t]here is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a post-deprivation hearing." Id. at 543.

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result

> in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under Sec. 1983. It is hard to perceive any logical stopping place to such a line of reasoning. . . . We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

468 U.S. at 544.

In Daniels v. Williams, Justice Rehnquist, writing for this Court, overruled Parratt but only to the extent the deprivation challenged had to be more than from a "lack of due care." Parratt's central holding – that the availability of post-deprivation remedy predicate will defeat the due process claim – was affirmed. 474 U.S. at 330.

In Hudson, this Court re-emphasized

> . . . that an authorized intentional deprivation of property by a state employee does not constitute a violation of procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available. For intentional, as for negligent deprivations of property by state employees, the state's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy.

Id. at 533.

The District Court's view of due process was visceral. Judge Schiltz: "I think it's quite clear if the government . . . deprives you of the use of your property even temporarily, it has deprived you of

property without due process." (T. 1271). That is not what Parrett, Daniels, and Hudson hold. Ignoring this Court's decisions, the government was left free to argue about individual "moral corruption" of undefined means, and Officer Rehak's free fall from his oath to uphold "professional standards." (T. 1281).

The Circuit held that Parratt, Daniels and Hudson "are inapposite here, where the focus is on the defendants' agreement, not the victim's damages." Rehak, 589 F.3rd at 972. The government now joined by the Circuit have accomplished what Justice Rehnquist cautioned against, i.e., turning a police slight into a violation of due process despite the availability of a post-deprivation remedy. Parratt, 541 U.S. at 544; Daniels, 474 U.S. at 333; Hudson, 468 U.S. at 533. It's one thing to focus on the agreement of a conspiracy, quite another to at least acknowledge what the statute demands, that the conspiracy must concern a recognized "right or privilege [that] is secured to him by the Constitution or laws of the United States." 18 U.S.C. 241.

Following Parratt, Daniels and Hudson, Petitioners requested Instruction 54: ". . . An intentional taking is not a deprivation of due process, however, if there is what is called a post-deprivation remedy available." Petitioners' Proposed Instruction 55 imposed the burden upon the government's to prove "[t]here is no post-deprivation remedy available to the United States to retrieve its money, that is, a civil law suit." Petitioners requested, in Proposed Instruction 58, the jury be told of specific post-deprivation remedies. "In Minnesota, a private citizen may sue a State employee in a civil action and allege a loss caused by that employee," citing Minn. Stat. 3.736; Parratt, 451 U.S. at 543-44. Mr. Pelligatti's supposed claim could have been contested in the

Ramsey County Conciliation Court. Minn. Stat. 609.5314, Subd. 2 (b)(3). (Appendix pgs. A-57 to A-62.)

Over objection (T. 1267-70, 1276, 1426), and without a definition that Parratt, Daniels and Hudson require, the conviction followed. The absence of a definition of due process "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). The government was erroneously relieved of their burden to prove an "essential element of a crime." Francis v. Franklin, 471 U.S. 307, 313 (1985). The Court's instructions permitted the conviction of a "generic" crime, Schad v. Arizona, 501 U.S. 624, 633 (1991), denying the Petitioners of their own process due. Stromberg. v. California, 283 U.S. 359, 367-68 (1931); Griffin v. United States, 502 U.S. 46, 53 (1991).

The Eighth Circuit has decided an important federal question in a way that conflicts with the decisions of this Court. Rule 10 (c), Rules of the Supreme Court of the United States.

II. INTERPRETING THE FEDERAL THEFT STATUTE, 18 U.S.C. 641, TO PERMIT CONVICTIONS FOR TEMPORARILY TAKING MONEY PURSUANT TO WARRANT WHICH IS FULLY ACCOUNTED FOR IS INCONSISTENT WITH MORISSETTE V. UNITED STATES AND UNITED STATES V. LEON

Over objection (T. 1251-52), the District Court instructed the jury that to "steal" means to "take something with the intent to deprive the thing's owner permanently or temporarily of the rights and benefits of ownership." Rehak, 589 F.3d at 973 (emphasis added). That sentence was in turn

modified: "Property can be converted through misuse or abuse of the property as well as
through it use in an unauthorized manner or to an unauthorized extent." District Court Instruction 17. The terms "extent" or "manner" were left undefined, however.

Morissette v. United States, 342 U.S. 246 (1952) is well known for the holding that criminal intent may be inferred in a felony statute even if not stated. 342 U.S. at 262. Mr. Morissette took expired shell casings from government property, believing that they were abandoned. Id. at 248. This Court ruled Mr. Morissette's jury should have considered his intention as an absolute defense, i.e., his thought that he could remove the property. Id. at 263.

Morrissette's language is less than certain for our setting. Again, here is the key sentence. "Probably every stealing is a conversion, but certainly not every conversion is stealing." Id. at 271 (emphasis added). At the core of Morissette is a dialectic without an answer. Of when a conversion is actually theft, and when it is not.

The word "temporary" does not appear in Sec. 641. If there, the term would be narrowly construed as to not "sweep[] broadly," Bailey v. United States, 516 U.S. 137, 143-47 (1995), temporal limits resolved in the favor of lenity. United States v. Santos, 128 S. Ct. 2020, 2025 (2008); United States v. Begay, 128 S.Ct. 1581, 1585 (2008). The reach of a federal criminal statute is not meant to be unlimited. E.g. United States v. Lopez, 514 U.S. 549, 567 (1995).

The Court refused Petitioners' Morissette instruction, number 41:

> The theory of the government's case is that the funds inside the hotel room were

> "converted" albeit temporarily. A conversion, in law, is not necessarily a theft. The distinction depends upon the intent of the taker. If the defendant's intent was to deprive permanently, then the conversion becomes a theft. If the conversion is limited in time, and lacks a party's intent to steal permanently, then it is not a crime.

Petitioners cited United States v. Kemble, 197 F.3d 316, 321 (3rd Cir. 1952) (holding that the defendant's actual and illicit intent to deprive the owner of the property was at the heart of conversion, citing Morrissette).

The Circuit has affirmed a result where the Petitioners do not know, still, at what moment they committed a crime, and at what minute before they were innocent. To hold that the taking can be temporary without defining what temporary means, Rehak, 589 F.3d at 973, is a circular result, a spinning of a nebulous word, a random application.

Six hours is the time limit now required to deliver an indicted arrestee to a Magistrate Judge, not five or four or three. See Corley v. United States, 129 S.Ct. 1558, 1571 (2009). At least Corely set a cutoff point.

A temporary conversion may be trivial, while a permanent one signals a different intent, Kemble, 197 F.3d at 321, an intent to keep the property "wrongfully." Morissette, 342 U.S. at 271. By making sure no money was missing, Petitioners ensured the integrity of the criminal justice system.

Had a legitimate defendant challenged this search and seizure (in either the criminal setting or by civil action), this case would be easily resolved. The search was pursuant to what the government's

concedes was a valid warrant, the errors ministerial and excused by good-faith and a lack of standing. The civil liability is nonexistent, barred by qualified immunity and the existence of a post-deprivation remedy.

Petitioners' "theft" is excused by this Court's jurisprudence. The Eighth Circuit has read Morissette contrary to Leon, Hudson, Herring, Pearson, and on the cases go. Rule 10 (a), Rules of the United States Supreme Court.

CONCLUSION

Based upon the foregoing, Petitioners request their Petition for Writ of Certiorari be granted.

Dated: March 16, 2010

Respectfully submitted,

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Minneapolis, MN 55402
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ATTORNEY FOR PETITIONERS

APPENDIX

Decision of the Eighth Circuit Court of Appeals... A-1

Judgment of Conviction
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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 09-1405

United States of America,

Plaintiff - Appellee,

v.

Timothy Conrad Rehak,

Defendant - Appellant.

No. 09-1406

United States of America,

Plaintiff - Appellee,

v.

Mark Paul Naylon,

Defendant - Appellant.

Appeals from the United States
District Court for the District of Minnesota.

Submitted: November 18, 2009
Filed: December 22, 2009

Before MURPHY, SMITH, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

After a jury trial in district court,[1] Timothy Conrad Rehak and Mark Paul Naylon were convicted of conspiring to violate civil rights under 18 U.S.C. § 241, and theft of government property under 18 U.S.C. § 641. They appeal. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

In 2004, Timothy Rehak, a law enforcement officer, and Mark Naylon, a public information officer, were working for the Special Investigations Unit of the Ramsey County Sheriffs Office (RCSO). In September, the FBI began investigating Rehak for corruption. On November 3, it conducted an "integrity test."

The FBI rented a room at the Kelly Inn under the (fictitious) name of Vincent Pelligatti, placing $13,500 in cash in a duffel bag there. The FBI instructed a cooperating individual to tell Rehak that a drug trafficker named "Vinnie" had been arrested in Wisconsin and was trying to recover drugs and money he left in room 503 at the hotel. Rehak replied that he would try to "scarf" the money and drugs out of the hotel room.

Rehak called Naylon. At about 1:15 p.m., Rehak arrived at the hotel; Naylon arrived a few minutes later. They asked the front-desk clerk to let them in to room 503; she refused because they did not have a search warrant. Rehak and Naylon contacted

---

[1] The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota.

Rolland Martinez, a Special Investigations sergeant, told him they had received information of narcotics and cash in the hotel room, and asked him to get a search warrant. When Sergeant Martinez arrived at the hotel to investigate, he found Naylon upset with the desk clerk. After gathering more facts, Sergeant Martinez left to obtain a state search warrant.

At 3:38 p.m., Rehak, Naylon, and Sergeant Martinez entered room 503. According to the FBI's video recording, Sergeant Martinez begins searching the bathroom while Rehak and Naylon search the main room. In the dresser, Rehak finds the duffel bag with the $13,500. While Sergeant Martinez is in the bathroom, Naylon motions for Rehak to give him some of the cash. Rehak hands Naylon $6,000, which he puts in his coat pocket. As Sergeant Martinez returns to the main room, Rehak purports to begin searching the bag and pulls out the remaining $7,500. Sergeant Martinez is unaware that Rehak had given $6,000 to Naylon. Naylon leaves the hotel room, goes to the trunk of his vehicle, and then returns to the room.

As part of the procedure for inventorying seized property, Sergeant Martinez and Rehak separately counted the $7,500 remaining in the bag. During this procedure, neither Rehak nor Naylon told Sergeant Martinez of the missing $6,000, which was not included in the count.

At 4:19 p.m., Rehak and Naylon spoke outside the hotel room; Rehak left in his car. A few minutes later, a deputy arrived with his drug dog. The deputy and Naylon entered the hotel room. The dog sniffed the $7,500. Naylon did not tell the deputy about the additional $6,000. In his report, the deputy stated

that $7,500 was seized. Sergeant Martinez completed a search warrant receipt, reporting only $7,500. Naylon reviewed the completed (inaccurate) receipt. A copy of this receipt was left in the hotel room to indicate what had been seized. As the inventory officer, Sergeant Martinez took control of the $7,500 and deposited it at the Special Investigations Unit. After the local officers left the hotel room, FBI agents entered, confirming that all $13,500 was gone.

That evening, according to Minnesota Bureau of Criminal Apprehension records, at 5:30 p.m. and again at 9:45 p.m., law enforcement databases were searched by RCSO clerks for "Vincent Pelligatti," the fictitious drug trafficker. No records were found for him. Sergeant Martinez and the drug-dog deputy testified at trial that they did not conduct any database searches for Vincent Pelligatti. The two warrant clerks who ran the searches could not recall who requested them.

Hours later, about midnight, Rehak and Naylon called Sergeant Martinez at home. Naylon said they had found an additional $6,000 in the hotel room under the mattress. The next day, Sergeant Martinez obtained the $6,000 and amended his report to reflect the full $13,500. Rehak completed a report that omitted where the $6,000 had been found and how it had been handled. When Sergeant Martinez asked him to add these details, Rehak replied he knew how to write a report and never made the requested changes.

One month later, the FBI asked the St. Paul Police Department (SPPD) to obtain the police reports of the Kelly Inn search. An SPPD supervisor asked the RCSO for reports from search warrants

executed at hotels, including the Kelly Inn. After specifically inquiring about a search warrant in November at the Kelly Inn, a RCSO records person said there was no record of the search. The SPPD supervisor reiterated the request. Rehak called back that day, saying he had not yet completed the report of the Kelly Inn search. Later that day, Rehak sent the report, which lacked the section explaining where the money was found.

Nine months after this first integrity test, the FBI conducted another test. The cooperating individual again contacted Rehak, saying that a drug trafficker had left drugs and money in a vehicle. FBI agents observed Rehak and Naylon watching the vehicle, but not entering it that day. Two days later, at 2:30 p.m., the cooperating individual again contacted Rehak, saying the vehicle had been moved. At 3:00 p.m., the FBI observed Naylon conducting surveillance on the vehicle. At 5:30 p.m., Rehak and Naylon called in a canine unit to sniff inside the vehicle; the dog did not alert for drugs.

At 8:40 p.m., Rehak called the cooperating individual and asked, "Why would anybody store a substantial amount of dope in a stolen car parked at a hotel?" The cooperating individual assured Rehak that drugs and money were there. At 10:00 p.m., with no other officers present, Rehak and Naylon entered the vehicle (where the FBI had placed video and audio recording devices). They found a bag in the trunk containing cash but no drugs. Immediately reacting that it was "odd" to find money but no drugs, Naylon stated, "Another f**kin' setup." Rehak said, "They're f**kin' probably watchin' us." They walked a short distance away from the car, talking briefly. Returning to the car, they discussed how to report the

incident and whether to admit they had been in the car. They called another deputy to tow it. Rehak said he would write a report for the incident, but he never did.

Rehak and Naylon were charged with six counts of honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346; one count of conspiring to violate civil rights, in violation of 18 U.S.C. § 241; and one count of theft of government property, in violation of 18 U.S.C. § 641. The jury acquitted on the wire fraud counts. It convicted both men of conspiring to violate civil rights, and theft of government property. The jury apparently did not believe Rehak's testimony that their intent was to play a practical joke on Sergeant Martinez. Instead, the verdicts adopted the government's theory of the case: Rehak and Naylon intended to steal the money, but later changed their minds and decided to return it.

II.

Defendants contend that there is insufficient evidence to support their convictions for conspiring to violate civil rights because they did not actually violate the civil rights of a real person. "In reviewing the sufficiency of the evidence, 'we view the evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that support the jury's verdict.'" ***United States v. Blazek,*** 431 F.3d 1104, 1107 (8th Cir. 2005), *quoting* ***United States v. Gaona-Lopez,*** 408 F.3d 500, 504 (8th Cir. 2005).

It is a crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate

any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." **18 U.S.C. § 241.** Rehak and Naylon were convicted based on their agreement to take Vincent Pelligatti's money in violation of his due process rights. Defendants argue that this fictitious person did not have rights, so they could not have conspired to violate them.

"Factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing about that objective." ***United States v. Sobrilski,*** 127 F.3d 669, 674 (8th Cir. 1997). "'Factual impossibility is not a defense to an inchoate offense' such as conspiracy or attempt." ***United States v. Joiner,*** 418 F.3d 863, 869 (8th Cir. 2005), ***quoting United States v. Fleming,*** 215 F.3d 930, 936 (9th Cir. 2000). "[T]he crime of conspiracy is complete on the agreement to violate the law implemented by one or more overt acts, however innocent such act standing alone may be, and it is not dependent on the success or failure of the planned scheme." ***United States v. Littlefield,*** 594 F.2d 682, 684 (8th Cir. 1979). *See also* ***United States v. Jannotti,*** 673 F.2d 578, 591 (3d Cir.) (en banc) (upholding Hobbs Act conspiracy convictions for receiving money to influence official conduct from undercover agents posing as foreign business executives seeking favorable government action), *cert. denied,* 457 U.S. 1106 (1982); ***United States v. Parker,*** 165 F. Supp. 2d 431, 456 (W.D.N.Y. 2001) (defendants convicted under 18 U.S.C. § 241 for conspiring to violate rights of a fictitious drug dealer, who was actually an undercover agent), *aff' d sub*

nom. ***United States v. Ferby,*** 108 Fed. Appx. 676, 680 (2d Cir. 2004) (unpublished).

In this case, the objective of defendants was to take the money of a drug trafficker, Vincent Pelligatti. Their goal, to keep his money as their own, violates the law. *See* ***United States v. McClean,*** 528 F.2d 1250, 1255 (2d Cir. 1976) (stating that police officers who convert to private purposes funds lawfully seized from suspected criminals violate those criminals' civil rights). The fact that Pelligatti was fictitious was unknown to Rehak and Naylon. This circumstance prevented them from actually violating a person's due process rights. While it was factually impossible to violate his rights, defendants were charged and convicted of *conspiring* to violate his rights. The crime was committed upon their agreement to steal his money. That they were unsuccessful is irrelevant to their culpability for conspiring.

The jury heard ample evidence that Rehak and Naylon conspired to take the money in violation of Pelligatti's due process rights: (1) a cooperating individual called Rehak to tell him a drug dealer named "Vinnie" had left money and drugs in a hotel room; (2) Rehak told the cooperating individual he would try to "scarf' the money and drugs from the hotel room; (3) Rehak and Naylon went to the hotel and tried to gain access without a search warrant, even though Rehak knew they needed a search warrant to enter the room; (4) Rehak found the money and handed $6,000 of it to Naylon, who pocketed it; (5) they allowed the other officers to believe only $7,500 was found; (6) Rehak falsified the search warrant return and his report of the incident; (7) even after returning the money, Rehak and

Naylon never told anyone about how or where it was actually found, or that they were playing a joke on Sergeant Martinez; and (8) they recognized the second FBI integrity test as "another setup." The evidence was sufficient for a reasonable jury to find that Rehak and Naylon agreed to take Pelligatti's money in violation of his due process rights.

III.

Defendants suggest they did not conspire to violate Pelligatti's rights, because if the facts were as they believed, the money was drug money subject to forfeiture. Even if defendants believed the money was forfeitable, agreeing to convert it to personal use, rather than following forfeiture procedures, is sufficient for conviction under 18 U.S.C. § 241. *See* ***McClean,*** 528 F.2d at 1255-56. Alternatively, defendants argue that they believed Pelligatti abandoned his money and therefore had no rights to it. This argument is contrary to the jury's finding that defendants conspired to steal money from an "owner."

Next, Rehak and Naylon claim that they cannot be convicted unless prior case law gave them "fair warning" that their conduct violated a federal civil right. *See* ***United States v. Lanier,*** 520 U.S. 259, 267-68 (1997). Relying on Fourth Amendment search-and-seizure cases, defendants argue that since they had a search warrant, the search of the hotel room and the seizure of the money were lawful, and their subjective motivations are irrelevant, citing *Whren v. United States,* 517 U.S. 806, 813 (1996). To the contrary, the indictment here charged a conspiracy to deprive property without due process of law. In this case, subjective motivations are relevant to prove the

intent to deprive property without due process of law under 18 U.S.C. § 241.

IV.

Defendants also assert that the district court erred in its instructions to the jury. This court reviews a district court's jury instructions for an abuse of discretion. ***United States v. Turner***, 189 F.3d 712, 721 (8th Cir. 1999). "In reviewing challenges to jury instructions, this Court recognizes that the district court has wide discretion in formulating the instructions, and we will affirm if the entire charge to the jury, when read as a whole, fairly and adequately contains the law applicable to the case." ***Blazek***, 431 F.3d at 1109.

A.

Defendants contend the district court erred in failing to define "due process" for the jury. The court instructed the jury that defendants must have reached "an understanding to injure a person in Minnesota in the enjoyment of his civil rights." The court further stated that to agree to injure a person in the enjoyment of his civil rights, the defendants must have agreed to steal "property and thereby depriv[e] its owner of property without due process of law." Defendants counter that the jury should have been instructed that a taking "is not a deprivation of due process . . . if there is what is called a post-deprivation remedy available."

Defendants cite no authority that a *criminal* violation under section 241 cannot occur if the state provides a post-deprivation remedy. The cases defendants cite hold that a plaintiff in a section 1983 action cannot recover for the loss of property by state

employees if the state provides an adequate remedy for the loss. *See* ***Parratt v. Taylor,*** 451 U.S. 527 (1980), *overruled on other grounds by* ***Daniels v. Williams,*** 474 U.S. 327, 329 (1986); ***Hudson v. Palmer,*** 468 U.S. 517 (1984). These cases are inapposite here, where the focus is on the defendants' agreement, not the victim's damages. Defendants' proposed instruction misstates the law.

Defendants also state that the district court erred in failing to instruct the jury that if it found that defendants' conduct did not "harm the citizens," then there was no constitutional violation. Defendants were charged with *conspiracy* to violate civil rights. The government was not required to prove they succeeded in violating the rights of others. This proposed instruction would also inaccurately state the law.

B.

Defendants also argue the district court erred in its instructions on the theft-ofgovernment-property charge. The statute provides: "Whoever . . . steals . . . or knowingly converts to his use or the use of another . . . any . . . money . . . of the United States or of any department or agency thereof . . ." shall be guilty of an offense against the United States. **18 U.S.C. § 641.**

The district court instructed the jury that:

> The crime of theft of government property as charged in Count 7 has three essential elements, which are:
>
> *One,* the defendant voluntarily, intentionally, and knowingly stole or converted

money to his own use or to the use of another;

Two, the defendant acted with the intent to deprive the owner of the use or benefit of the money so taken; and

Three, the money belonged to the Untied States . . . .

With respect to the first element: To "steal" means to knowingly take something with the intent to deprive the thing's owner permanently or temporarily of the rights and benefits of ownership. To "convert" means to deliberately take or retain something with the intent to deprive the thing's owner of its use or benefit either temporarily or permanently. Property can be converted through misuse or abuse of the property as well as through its use in an unauthorized manner or to an unauthorized extent.

With respect to the second element – that is, the defendant's intent – the government need not prove that the defendant knew that the United States owned the money at the time of the taking.

* * *

Defendants argue this instruction is erroneous in two ways. First, the jury could convict even if it found that defendants intended only to take the money temporarily. They proposed the following instruction:

If the defendant's intent was to deprive permanently, then the conversion becomes a

> theft. If the conversion is limited in time, and lacks the party's intent to steal permanently, then it is not a crime.

This is not the law.

> Conversion . . . may be consummated *without any intent to keep* and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use.

Morissette v. United States, 342 U.S. 246, 271-72 (1952) (emphasis added).

In *Morissette,* the Supreme Court recognized that section 641 intended to fill "the gaps or crevices on the law on larceny-type offenses." ***United States v. McRee,*** *7* F.3d 976, 982 (11th Cir. 1993) (en bane), *citing* ***Morissette,*** 342 U.S. at 271-72, *cert. denied sub nom.* ***Hale v. United States,*** 511 U.S. 1071 (1994). The statute reaches all instances where "one may obtain wrongful advantages from another's property." ***Morissette,*** 342 U.S. at 271. Section 641 prohibits both permanent and temporary takings. *See, e.g.,* ***McRee,*** *7* F.3d at 980; ***United States v. Howard,*** 30 F.3d 871, 875 (7th Cir. 1994); ***United States v. Sparkman,*** 112 Fed. Appx. 358, 360 (5th Cir. 2004) (unpublished) (conviction for theft of government funds did not require proof defendant intended to permanently deprive the government of

funds). The district court's instruction fairly stated the law by including temporary takings.[2]

Finally, Defendants argue that the district court committed plain error, Fed. R. Crim. P. 52(b), by instructing that "the government need not prove that the defendant knew that the United States owned the money at the time of the wrongful taking." "Under plain error review, 'there must be (1) error, (2) that is plain, and (3) that affects substantial rights.'" ***United States v. Vincent,*** 575 F.3d 820, 825 (8th Cir. 2009), *quoting* ***United States v. Keller,*** 413 F.3d 706, 710 (8th Cir. 2005). Here, there was no error because the government need not allege or prove that the defendants knew the property was the property of the United States. *See* ***United States v. Denmon,*** 483 F.2d 1093, 1095 (8th Cir. 1973).

Defendants contend the Supreme Court's recent decision in *Flores-Figueroa v. United States,* 129 S. Ct. 1886 (2009), effectively overrules *Denmon.* In *Flores-Figueroa,* the Supreme Court interpreted 18 U.S.C. § 1028A:

> Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of

---

[2] Defendants cite *United States v. May,* 625 F.2d 186, 192-93 (8th Cir. 1980), where this court held that a conviction under section 641 requires a serious violation of the owner's right to the property. At trial, defendants did not cite *May,* nor request an instruction requiring the jury to find a "serious violation." Here, there was no plain error because the court's instruction, following *Morissette,* required a serious violation by telling the jury that it must find defendants "acted with the intent to deprive the owner of the use or benefit of the money so taken."

> another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

The Court stated that as "a matter of ordinary English grammar," the word "knowingly" must apply to "all the subsequently listed elements of the crime." ***Flores-Figueroa,*** 129 S. Ct. at 1890. Therefore, the government must prove that the defendant knew that the "means of identification" belonged to "another person." ***Id.*** at 1894.

Defendants would apply this construction to section 641: to be convicted, they must know the property they steal is owned by the United States. The context of section 641 defeats this interpretation. Courts have consistently held that the government is not required to prove a defendant knew the property he stole was owned by the United States because the United States' ownership merely provides the basis for federal jurisdiction. *See* ***United States v. Speir,*** 564 F.2d 934, 938 (10th Cir.), *cert. denied,* 435 U.S. 927 (1978); ***United States v. Jermendy,*** 544 F.2d 640, 641 (2d Cir.), *cert. denied,* 430 U.S. 909 (1976); ***United States v. Crutchley,*** 502 F.2d 1195, 1201 (3d Cir. 1974); ***Denmon,*** 483 F.2d at 1095; ***United States v. Smith,*** 489 F.2d 1330, 1333-34 (7th Cir.), *cert. denied,* 416 U.S. 994 (1973); ***United States v. Boyd,*** 446 F.2d 1267, 1274 (5th Cir. 1971); ***United States v. Howey,*** 427 F.2d 1017, 1018 (9th Cir. 1970).

The *Howey* case explains:

> It was not an essential part of the common law larceny-type offense that the thief knew who owned the property he took; it was enough that he knew it did not belong to him. The

> legislative history provides no support for an assumption that Congress intended in section 641 to add to the common law offenses a new requirement that a thief know who owned the property he was stealing.
>
> The reason for including the requirement that the property, in fact, belongs to the Government was to state the foundation for federal jurisdiction. A defendant's knowledge of the jurisdictional fact is irrelevant, as we have held in many cases interpreting analogous statutory provisions.

Howey, 427 F.2d at 1018. *See also* ***United States v. Feola***, 420 U.S. 671, 676-77 (1975) (holding that knowledge of the victim's true identity as a federal officer was unnecessary to an indictment for conspiracy to assault a federal officer, because the federal-officer element was jurisdictional); ***United States v. Cox***, 577 F.3d 833, 838 (7th Cir. 2009) (in prosecution for interstate transportation of a minor for sexual activity, holding that government was not required to prove defendant knew that person transported for sex was not yet 18, stating that *Flores-Figueroa* did not apply in this context). The district court correctly instructed the jury that the government was not required to prove the defendants knew the money was owned by the United States. In sum, the district court's instructions fairly and adequately stated the law applicable to this case.

V.

Defendants argue the government's indictment, and the jury's verdicts, are internally contradictory. They claim it is impossible for them to be guilty of stealing money that was both Vincent Pelligatti's and

the government's. As discussed earlier, defendants were not charged or convicted of stealing Pelligatti's money. They were charged and convicted of *conspiring* to do so. By the jury's verdicts, it concluded Rehak and Naylon believed that Vincent Pelligatti left drug money in a hotel room, and they agreed to steal part of it. Unbeknownst to them, the money belonged to the government. The verdicts are not internally inconsistent.

VI.

Defendant Rehak objects that the district court erred in finding he perjured himself at trial and in applying an adjustment for obstruction of justice at sentencing. The district court's interpretation of the Sentencing Guidelines is reviewed de novo while its factual findings underlying an adjustment for obstruction of justice are reviewed for clear error and given great deference. ***United States v. Brown***, 539 F.3d 835, 839 (8th Cir. 2008).

"Under U.S.S.G. § 3C1.1 a defendant is subject to a two level enhancement if he 'testifies falsely under oath in regard to a material matter and does so willfully rather than out of confusion or mistake.'" ***Id., quoting United States v. Mendoza-Gonzalez,*** 363 F.3d 788, 796 (8th Cir. 2004). "When a defendant objects to an obstruction enhancement based on perjury, the district court must make findings that the defendant willfully gave false testimony concerning a material matter in the case." ***Id.***

In applying the enhancement at sentencing, the court stated:

> I do, however, find it more likely than not that Mr. Rehak perjured himself when he testified

> under oath that he did not intend to steal money from the Kelly Inn, but that he and Mr. Naylon were playing a prank on Sergeant Martinez. This testimony was, in the words of Comment 2 to Section 3C1.1, "a denial of guilt under oath that constitutes perjury." I further find that Mr. Rehak's false testimony related a material matter and was done willfully rather than out of confusion, mistake, or faulty memory. I have already described the basis for this finding, when I described the basis for my finding that Mr. Rehak and Mr. Naylon intended to permanently take the $6,000. I will therefore apply, over the defense objection, the two-level enhancement under Section 3C 1.1 for obstruction of justice.

Rehak cites *United States v. Dunnigan,* 507 U.S. 87 (1993), arguing that it holds that the enhancement is precluded when the defendant's perjury relates to his intent. Rehak misreads *Dunnigan.* The Court then stated that the enhancement is not appropriate merely because a jury renders a guilty verdict and disbelieved or found inadequate a defendant's testimony. ***Dunnigan,*** 507 U.S. at 95. The Court held that "a district court must review the evidence and make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same." ***Id.*** The district court made the proper findings in this case, which were not clearly erroneous.

VII.

The judgments of the district court are affirmed.

United States District Court
District of Minnesota

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v. Case Number: **08-CR-72(1) (PJS/SRN)**
USM Number: **13851-041**
Social Security Number: XXX-XX-7100
Date of Birth: 1960

Timothy Conrad Rehak

Paul C. Engh, Kevin J. Short
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): .
[ ] pleaded nolo contendere to counts(s) which was accepted by the court .
[X] was found guilty on count(s) **7 and 8** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

		Offense	
Title & Section	**Nature of Offense**	**Ended**	**Count**
18 U.S.C. §641	Theft of Government Funds	November 3, 2004	7
18 U.S.C. §241	Conspiracy to Violate Civil Rights	July 2005	8

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on counts(s) 1-6. **The jury acquitted the defendant on Counts 1-4 and the Court on Counts 5-6.**

[ ] Count(s) (is)(are) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in economic circumstances.

February 6, 2009
Date of Imposition of Judgment

s/Patrick J. Schiltz
Signature of Judge

PATRICK J. SCHILTZ, United States District Judge
Name & Title of Judge

February 9, 2009
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **35 months, on each of counts 7 and 8, to be served concurrently.**

[X] The court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated at the Federal Prison Camp in Duluth or at another facility where the defendant will be safe from inmates who might want to harm him.

[ ] The defendant is remanded to the custody of the United States Marshal.

[X] The defendant shall surrender to the United States Marshal for this district.

[X] at **Minneapolis, MN** on **Monday, March 9, 2009 by 10:00 a.m..**

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before on.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on_____to_____ a_____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **2 years, on each of counts 7 and 8, to run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[X] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[X] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this Judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation

officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

a The defendant shall not commit any crimes, federal, state, or local.

b The defendant shall abide by the standard conditions of supervised release recommended by the Sentencing Commission.

c The defendant shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon.

d Within 72 hours of the defendant's release from the custody of the Bureau of Prisons, the defendant must report to the probation office in the district where he is released.

e The defendant must not unlawfully use or unlawfully possess any controlled substance.

f Because the Court determines that the defendant poses a low risk of future substance abuse, the defendant is not required to undergo mandatory drug testing.

g The defendant shall cooperate in the collection of DNA as approved by the probation officer and mandated by 18 U.S.C. §§ 3563(a) and 3583(d).

The probation office is directed to furnish the defendant a written statement of all of the conditions of his supervised release.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

Assessment	Fine	Restitution

Totals: $200 $7,500 $0

[ ] The determination of restitution is deferred until. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. §3664(i), all nonfederal victims must be paid before the United States is paid.

Name and Address of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
n/a			
TOTALS:	$0.00	$0.00	0.00%

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.

[ ] Restitution amount ordered pursuant to plea agreement $.

[X] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the

payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine [ ] restitution.

[ ] the interest requirement for the: [ ] fine H restitution is modified as follows:

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [X] Lump sum payment of **$7,500.00** due in full before the fifteenth day after the date of judgment.

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the date of this judgment; or

D [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g. months or years), to commence (e.g. 30 or 60 days)

after the release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7)penalties, and (8) costs, including costs of prosecution and court costs.

United States District Court
District of Minnesota

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE
v. Case Number: **08-CR-72(2) (PJS/SRN)**
USM Number: **13850-041**
Social Security Number: XXX-XX-6473
Date of Birth: 1960

Mark Paul Naylon

Paul W. Rogosheske
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): .
[ ] pleaded nolo contendere to counts(s) which was accepted by the court .
[X] was found guilty on count(s) 7 - 8 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

		Offense	
Title & Section	Nature of Offense	Ended	Count
18 U.S.C. §641	Theft of Government Funds	November 3, 2004	7
18 U.S.C. §241	Conspiracy to Violate Civil Rights	July 2005	8

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on counts(s) 1-6. **The jury acquitted the defendant on Counts 1-4 and the Court on Counts 5-6.**

[ ] Count(s) (is)(are) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material change in economic circumstances.

February 6, 2009
Date of Imposition of Judgment

s/Patrick J. Schiltz
Signature of Judge

PATRICK J. SCHILTZ, United States District Judge
Name & Title of Judge

February 9, 2009
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be

imprisoned for a total term of **30 months, on each of counts 7 and 8, to be served concurrently**.

[X] The court makes the following recommendations to the Bureau of Prisons:

That the defendant be incarcerated at the Federal Prison Camp in Duluth or at another facility where the defendant will be safe from inmates who might want to harm him.

[ ] The defendant is remanded to the custody of the United States Marshal.

[X] The defendant shall surrender to the United States Marshal for this district.

[X] at **Minneapolis, MN** on **Monday, March 9, 2009 by 10:00 a.m.**.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before on.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on_____to_____ a_____, with a certified copy of this judgment.

United States Marshal

By _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **2 years, on each of counts 7 and 8, to run concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[X] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

[X] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this Judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such

notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

a The defendant shall not commit any crimes, federal, state, or local.

b The defendant shall abide by the standard conditions of supervised release recommended by the Sentencing Commission.

c The defendant shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon.

d Within 72 hours of the defendant's release from the custody of the Bureau of Prisons, the defendant must report to the probation office in the district where he is released.

e The defendant must not unlawfully use or unlawfully possess any controlled substance.

f Because the Court determines that the defendant poses a low risk of future substance abuse, the defendant is not required to undergo mandatory drug testing.

g The defendant shall cooperate in the collection of DNA as approved by the probation officer and mandated by 18 U.S.C. §§ 3563(a) and 3583(d).

The probation office is directed to furnish the defendant a written statement of all of the conditions of his supervised release.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals:	$200	$7,500	$0

[ ] The determination of restitution is deferred until. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. §3664(i), all nonfederal victims must be paid before the United States is paid.

Name and Address of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
n/a			
TOTALS:	$0.00	$0.00	0.00%

Payments are to be made to the Clerk, U.S. District Court, for disbursement to the victim.

[ ] Restitution amount ordered pursuant to plea agreement $.

[X] The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine [ ] restitution.

[ ] the interest requirement for the: [ ] fine H restitution is modified as follows:

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [X] Lump sum payment of **$7,500.00** due in full before the fifteenth day after the date of judgment.

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the date of this judgment; or

D [ ] Payment in equal (e.g., weekly, monthly, quarterly) installments of $ over a period of (e.g. months or years), to commence (e.g. 30 or 60 days) after the release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within (e.g. 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7)penalties, and (8) costs, including costs of prosecution and court costs.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Plaintiff, Case No. 0:08-CR-0072 (PJS/SRN)

v. ORDER

(1) TIMOTHY CONRAD REHAK and
(2) MARK PAUL NAYLON,

Defendants.

John R. Marti and Joseph T. Dixon, III, UNITED STATES ATTORNEY'S OFFICE, for plaintiff.

Paul C. Engh, ENGH LAW OFFICE; Kevin J. Short, SHORT LAW FIRM, for defendant Timothy Conrad Rehak.

Paul W. Rogosheske, THUET, PUGH, ROGOSHESKE & ATKINS, LTD., for defendant Mark Paul Naylon.

This matter is before the Court on the renewed motion of defendant Timothy Conrad Rehak, joined by defendant Mark Paul Naylon, for judgment of acquittal or for a new trial. The Court denies the motion.

Defendants argue that their conviction on Count 7, for theft of government property, cannot stand because the crime requires a permanent taking of property. Defendants argue that someone who takes the property of the federal government does not "steal []" that property or "knowingly convert[] [that property] to his use" for purposes of 18 U.S.C. § 641 — even if he keeps it for days or weeks or months — as long as he does not intend to keep it permanently.

The Court has already rejected this argument, which is contrary to the language of the statute and which appears to be unsupported by any authority. Defendants provide no new legal support for their argument, and thus the Court again rejects it.

Defendants also argue that their conviction on Count 8, for conspiracy to violate civil rights, cannot stand because they acted in good faith and did not intend to permanently deprive anyone of property. These arguments, too, have already been rejected by the Court. Defendants also make various objections to the jury instructions with respect to Count 8 (for instance, that the instructions did not identify an individual who was deprived of his civil rights). Defendants have provided the Court no reason to doubt the correctness of its earlier rulings or of its jury instructions, and the Court therefore rejects these challenges to defendants' convictions.

Defendants raise only one new argument that merits somewhat extended comment. They contend that because the jury acquitted them of wire fraud as charged in Counts 1 through 4, the core of the government's case crumbled with the acquittal, and their convictions on Counts 7 and 8 cannot stand. Counts 7 and 8, however, did not require proof of any use of the wires. To sustain a conviction under either Count 7 or Count 8, the government was required to prove only that the defendants stole the money (or conspired to steal the money), not why they later returned the money. In other words, from the jury's failure to conclude beyond a reasonable doubt that Rehak or Naylon caused a wire transmission to be used in connection with their theft of money, it does not follow that no reasonable jury could conclude beyond a reasonable doubt that Rehak and Nalyon

stole government funds (Count 7) or conspired to deprive a citizen of his civil rights (Count 8). Indeed, even on defendants' theory of the case — that they took the money as a practical joke — the jury could have found them guilty on at least Count 7, since even a temporary taking counts as theft under 18 U.S.C. § 641.

Further, the jury heard evidence from other law-enforcement officers (including at least one who was plainly sympathetic to defendants) that it is highly implausible that a sworn police officer would secretly pocket money found during a search and permit a false search-warrant receipt to be left — in almost certain violation of state law, as well as a number of departmental regulations — merely to play a practical joke on another police officer. From that evidence and the rest of the evidence presented at trial, the jury was entitled to disbelieve defendants' story about why they took money during the hotel-room search and to instead credit the government's theory of the case — that defendants intended to steal the money but later (for whatever reason) got cold feet and returned it. Such evidence supports the conviction on both Count 7 and Count 8.

ORDER

Based on the foregoing and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT the renewed motion of defendant Timothy Conrad Rehak for judgment of acquittal or a new trial [Docket No. 103], joined by defendant Mark Paul Naylon [Docket No. 107], is DENIED.

Dated: November 26, 2008

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Plaintiff, Case No. 0:08-CR-0072 (PJS/SRN)

v. ORDER

(1) TIMOTHY CONRAD REHAK and
(2) MARK PAUL NAYLON,

Defendants.

Joseph T. Dixon, III and John R. Marti, UNITED STATES ATTORNEY'S OFFICE, for plaintiff.

Kevin J. Short, SHORT LAW FIRM; Paul C. Engh, ENGH LAW OFFICE; for defendant Timothy Conrad Rehak.

Paul W. Rogosheske, THUET, PUGH, ROGOSHESKE & ATKINS, LTD., for defendant Mark Paul Naylon.

This matter is before the Court on the objections of defendants Timothy Conrad Rehak and Mark Paul Naylon to the June 5, 2008 Report and Recommendation ("R&R") of Magistrate Judge Susan R. Nelson. Because Judge Nelson had before her one motion filed by Naylon alone (a motion to suppress evidence) and several motions filed by Rehak and joined by Naylon, her R&R was docketed twice, once with respect to each defendant [Docket Nos. 47 & 48]. The Court heard argument on defendants' objections on July 10, 2008.

Naylon moves to suppress evidence that police gathered when they searched a policedepartment-owned car that was in Naylon's garage. Judge Nelson recommends denying the motion. Because Naylon has

not objected to this recommendation, the Court adopts it and denies the suppression motion.

Rehak moves, in four separate motions, to dismiss all eight counts of the indictment and to strike certain portions of the indictment as surplusage. Naylon joins these motions. Judge Nelson, in her R&R, recommends denying all four motions. The Court has reviewed de novo those portions of the R&R to which Rehak and Naylon object, as required by 28 U.S.C. § 636(b)(1) and Fed. R. Crim. P. 59(b)(3), and agrees with Judge Nelson's reasoning and recommendation. The Court therefore adopts her R&R and denies the motions.

The Court notes, however, that it is not entirely clear, under Eighth Circuit law, precisely what conduct by a defendant can support a prosecution for honest-services wire fraud under 18 U.S.C. §§ 1343 and 1346. In particular, the Eighth Circuit held in *United States v. Jennings* that when a public official violates a state statute, the violation is *sufficient* to support a charge of honest-services wire fraud. 487 F.3d 564, 578 (8th Cir. 2007). But *Jennings* expressly declined to say whether such a violation is *necessary* to support a charge of honest-services wire fraud. *Id.* ("[B]ecause we hold that the government presented evidence sufficient to prove that Jennings violated Minn. Stat. § 10A.07, we save our discussion of the limits of § 1346 for a future case."). This lack of clarity does not warrant dismissing counts 1 to 6 of the indictment, but it will have to be taken into account in crafting the jury instructions and verdict form.

That process may prove to be difficult. At the July 10 hearing, the Court expressed concern to the

government about how broadly it had charged this case. The heart of the government's case is simple and straightforward: Rehak and Naylon stole some of the money that they found during the November 3, 2004 search. If the jury accepts this theory, it will almost surely find that Rehak and Naylon violated Minn. Stat. § 609.52, and, under *Jennings,* there is no question that a violation of Minn. Stat. § 609.52 is sufficient to support an honest-services wire-fraud conviction.

But the government has charged a much broader case. It argues that, even if the jury *rejects* its theory and concludes that Rehak and Naylon did *not* steal money on November 3, 2004, the jury could nevertheless convict the defendants of wire fraud based upon violations of, for example, a rule of conduct of the St. Paul Police Department requiring officers to report that they are under investigation, or a rule of conduct of the Ramsey County Sheriff's Department requiring deputies not to conduct themselves in a manner that "adversely affects the morale or efficiency of the department," or a Minnesota statute requiring peace officers to leave a receipt for items taken during the execution of a search warrant. Likewise, the government argues that the jury could convict the defendants for their actions in connection with a July 14, 2005 search in which the defendants did not steal anything. In short, the government has charged this case about as broadly as possible, apparently hoping to make new law, or hoping that, if the jury rejects their core contention, the jury will still convict the defendants of something.

The government's decision will substantially prolong this trial and require the Court to ask the

jury to do a great deal of arguably unnecessary work. If the Court understands the government's position, it wants the jury to be asked, with respect to each defendant, and with respect to each of the six wire-fraud counts, whether the conduct of the defendant violated any of a list of state statutes, departmental rules, or common-law duties. The jury potentially will have to answer dozens of questions to resolve what should be a simple case.

At the July 10 hearing, the Court urged the government to consider narrowing the charges so as to avoid raising very complicated legal issues and somewhat troubling equitable considerations. In response, the government sent a letter to the Court agreeing that, for purposes of this case only, the jury may be instructed "that a violation of a state-imposed duty is necessary to find the defendants guilty of Counts 1 through 6." Gov't Letter July 16, 2008 at 1.

Unfortunately, though, the government did not define "state-imposed duty." If "state-imposed duty" includes the duty to follow departmental rules (as the government's letter implies) and to act consistently with common-law fiduciary obligations, then the government has not narrowed its case at all. Moreover, the government warns that it "will seek a superseding indictment next week adding a few additional state law provisions on point." *Id.* Thus, the government seems to have responded to this Court's suggestion that it simplify its case by deciding to *add* yet more state-law provisions to the already lengthy list that appears in the indictment.

None of this is directly relevant to the question of whether Judge Nelson's R&R should be adopted. But the parties are warned that because the

government has charged this case very broadly, and because the government seems unwilling to meaningfully narrow or simplify the issues, the parties should be prepared to do substantial legal research and briefing while in trial and to devote substantial time to assisting the Court in figuring out how the jury will be charged and verdict form drafted.

ORDER

Based on the foregoing and on all of the files, records, and proceedings herein, the Court OVERRULES the objections of defendants Rehak and Naylon and ADOPTS Judge Nelson's R&R [Docket Nos. 47 & 48]. Accordingly, IT IS HEREBY ORDERED THAT:

1. Naylon's motion to suppress [Docket No. 34] is DENIED.
2. Rehak's motion to dismiss counts 1-6 [Docket No. 22], joined by Naylon [Docket No. 35], is DENIED.
3. Rehak's motion to dismiss count 7 [Docket No. 23], joined by Naylon [Docket No. 35], is DENIED.
4. Rehak's motion to dismiss count 8 [Docket No. 24], joined by Naylon [Docket No. 35], is DENIED.
5. Rehak's motion to strike surplusage [Docket No. 25], joined by Naylon [Docket No. 35], is DENIED.

Dated: July 21, 2008 s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CR 08-72 (PJS/SRN)

United States of America,

Plaintiff,

vs.

DEFENDANT'S MOTION TO DISMISS COUNT 7

Timothy Conrad Rehak,

Defendant.

The defendant, Timothy Conrad Rehak, through and by his attorneys, Kevin Short and Paul Engh, and Rule 12 (b)(3)(B), Fed.R.Crim.P., moves the Court for an Order dismissing Count 7. Our grounds are these:

1. Count 7 alleges a theft of government funds, in violation of 18 U.S.C. 641.

2. The Statute prohibits the purloining, stealing and converting of government property. It doesn't speak to a scenario where a defendant takes into account and returns, reflecting an intent to not permanently possess.

3. The Government's claim is that the taking may be temporary, citing dicta from United States v. Howard, 230 F.3d 871, 876 (7th Cir. 1994). The Eighth Circuit hasn't reached the issue. Our case law speaks to a permanent taking. E.g. United States v. Churder, 387 F.2d. 825 (8th Cir. 1968) (noting no return intended during theft); United States v. Sun Bear, 307 F.3d 747, 755 (8th Cir. 2002) (noting that the auto theft in question featured the defendant's decision to never return the vehicle).

The Eighth Circuit's model instruction for 18 U.S.C. 641 does not define theft as temporary. Sec. 6.18.641. Sec. 641. And that the members of the committee in charge of drafting the instructions include Judge Ann D. Montgomery and Judge Richard H. Kyle. Neither has signed off on language conflating permanent with temporary.

4. The Supreme Court's discussion of theft connotes the permanent as well. Morissette v. United States, 342 U.S. 246, 266-67 n. 28 (1952).

4. The rule of lenity, discussed in our Motion to Dismiss Counts 1-6, precludes the Court from finding a clear meaning in a criminal statute where there isn't one.

This motion is based upon the files, records and proceedings herein, such testimony as may be presented at the motions hearing, and any briefing which the Court may require thereafter.

Dated: April 16, 2008

Respectfully submitted,

/s/ Paul Engh

PAUL ENGH
Suite 215 Pillsbury Center 220
South Sixth Street
Minneapolis, MN 55402
612.252.1100

KEVIN SHORT
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CR 08-72 (PJS/SRN)

United States of America,

Plaintiff, **DEFENDANT'S MOTION TO DISMISS COUNT 8**

vs.

Timothy Conrad Rehak,

Defendant.

* *

The defendant, Timothy Conrad Rehak, through and by his attorneys, Kevin Short and Paul Engh, in accordance with Rulie 12 (b)(3)(B), Fed.R.Crim.P., moves the Court for an Order dismissing Count 8. Our grounds:

1. This Count alleges that Officer Rehak and Mr. Naylon, "acting under the color of the laws of the State of Minnesota" conspired to "injure a person or persons," by depriving them "of property without due process..." The accusation has no basis in law.

2. This paradigm is set. An indictment is ordinarily sufficient if it lists the requisite elements with a sense of clarity. Rule 7 (c), Fed.R.Crim.P.; United States v. Fleming, 526 F.2d 191, 192 (8th Cir. 1975).

3. But also axiomatic is that both Officer Rehak and Mr. Naylon had abundant discretion in fulfilling their duties. Their actions, under the color of law, are not to be the subject of "judicial second-guessing months and years after an arrest or search is made." Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2002). To that end, Mr. Naylon and Officer Rehak had the absolute right to seize the money.

They acted pursuant to warrant, signed by a judge directing that they do search and take away.

4. Our complaint is this: the retention of the cash, for a very short period of time (less than four hours), is not significant enough to warrant a constitutional violation. The failure to place an item on an inventory sheet (this Indictment's central administrative allegation) is ministerial in nature, does not run afoul of any Amendment, including the Fourth. United States v. Hepperle, 810 F.2d 836, 839 (8th Cir. 1987); United States v. Williamson, 439 F.3d 1125, 1131 (9th Cir. 2006).

5. The law has always been tolerant of delay in the Constitutional context, especially when police officers are involved. Under Fifth Amendment jurisprudence, for example, a police officer is permitted to in effect hold a suspect in his house for seven hours, and the same is not considered custodial. See United States v. Czichray, 378 F.3d 822, 826 (8th Cir. 2004), cert. denied, 544 U.S. 1060 (2005).

Similarly, delays in bringing a defendant to Court after he has been charged are routinely excused. E.g. United States v. Pugh, 25 F.3d 669, 674 (8th Cir. 1994)(six-hour delay harmless). The due process right of presentment, dating back to McNabb v. United States, 318 U.S. 332, 347 (1943) and Mallory v. United States, 354 U.S. 449, 353 (1957) has been eviscerated.

Government agents are permitted to re-interview a defendant who exercises his right of silence, the passing of time not a predicate for Fifth Amendment claim. Michigan v. Mosely, 423. U.S. 96, 102-104 (1975); Jackson v. Dugger, 837 F.2d 1469, 147172 (11th Cir. 1988)(six hour time lapse between

the time the defendant asserted his privilege and the re-approach by law enforcement permitted).

Failure to afford a defendant a speedy trial, caused by governmental delay, merely results in recharging, starting the case anew. E.g. United States v. Meyer, 609 F.2d 1247, 1251 (8th Cir. 1990).

6. All of these cases say a short time passing does not make for a Constitutional violation. It follows that the keeping of money for a couple of hours is not a deprivation of due process, either. This is so because a supposed civil rights violation does not confer a remedy unless the harm is completed and permanent. In the excessive use of force context, for example, the harm can't be a fading bruise, a slight of hand. Bones broken are the pre-requisites. E.g. Crumley v. City of St. Paul, 324 F.3rd 1003, 1007 (8th Cir. 2003)(no constitutional tort for temporary harm, hurt feelings, a sense of unfairness); Curd v. City Court, 141 F.3d 839, 841 (8th Cir. 1998) (same). The temporal is not the permanent.

7. The Indictment claims a specific intent, forgetting that subjective motivations of the seizing officers are irrelevant in the Fourth Amendment setting. Brigham City, Utah v. Stuart, 547 U.S. 398 (2006). Even assuming, arguendo, Officer Rehak and Mr. Naylon had improper motives, that isn't the question to be decided. Id.; Whren v. United States, 517 U.S. 806, 813 (1996).

In any event our position is that the $6,000.00 was taken as a prank, a joke, a defense that has never been rebutted by the Government, and indeed cannot be. The discovery is silent to the contrary, and silence is not proof.

8. The Government will claim prematurity. This motion ought not be one reserved for the vagaries of trial, the parties left to argue about the

thought process, Freud say, or Canetti's theory of crowds and power. The taking was permitted pursuant to warrant, and the later (and accurate) accounting of the money does not give rise to a Constitutional violation. End of case.

This Motion is based upon the files, records and proceedings herein, such testimony as may be presented at the motion hearing, and any briefing which the Court may require thereafter.

Dated: April 16, 2008

Respectfully submitted,

/s/ Paul Engh
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CR 08-72 (PJS/SRN)

United States of America, Plaintiff, vs. Mark Naylon, Defendant.	**DEFENDANT NAYLON'S MOTION TO JOIN**

The defendant, Mark Naylon, through and by his attorney, Paul W. Rogosheske, moves to join in all motions made by the co-defendant, Timothy Rehak, and his attorneys, Kevin Short and Paul Engh, due to a joint endeavor and corroboration in bringing said motions and to avoid duplication for the Court. We therefore join in the following motions made by Defendant Rehak:

1. Defendant's Motion to Disqualify the United States Attorney;
2. Defendant's Motion to Dismiss Counts 1 Through 6;
3. Defendant's Motion to Dismiss Count 7;
4. Defendant's Motion to Dismiss Count 8;
5. Defendant's Motion to Strike Surplusage;
6. Defendant's Motion for Bill of Particulars;
7. Defendant's Motion for Pretrial Disclosure of Informants and Their Contracts and Agreements;

8. Motion for Discovery and Inspection;

9. Motion to Compel Attorney for the Government to Disclose Evidence Favorable to the Defendant;

10. Defendant's Motion for Disclosure of 404(b) Evidence;

11. Defendant's Motion for Government Agents to Retain Rough Notes; and

12. Defendant's Motion to Continue Trial Date.

Defendant Naylon brings the separate Motion to Suppress Search and Seizure.

Dated: April 16, 2008 Respectfully submitted,

THUET, PUGH, ROGOSHESKE & ATKINS, LTD.

By: /s/

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DEFENDANT'S REQUESTED INSTRUCTION 41
The Distinction Between Conversion and Theft

The theory of the government's case is that the funds inside the hotel room were "converted" albeit temporarily. A conversion, in law, is not necessarily a theft. The distinction depends upon the intent of the taker. If the defendant's intent was to deprive permanently, then the conversion becomes a theft. If the conversion is limited in time, and lacks a party's intent to steal permanently, then it is not a crime.

United States v. Morrissette, 342 U.S. 246, 271 (1952); United States v. Kemble, 197 F.3d 316, 321 (3rd Cir. 1952)(holding the defendant's actual and illicit intent to deprive the owner of the property is the heart of conversion, citing Morrissette)

DEFENDANT'S REQUESTED INSTRUCTION 49
Elements of Theft of Government funds

The crime of theft of government property has three essential elements:

1. The defendant voluntarily, intentionally and knowingly stole money for his own use or use of another;

2. The money belong to the United States and had a value in excess of one thousand dollars ($1,000.00); and

3. The defendant did so with intent to permanently deprive the owner of the use or benefit of the money;

It is not necessary to prove that the defendant knew that the government owned the money at the time of the theft.

If you have a reasonable doubt as to any of the three elements, you must find the defendant not guilty.

Eighth Circuit Model Instructions, Sec. 6.18.641(citing Crabb v. Zerbst, 99 F.2d 562 (5th Cir. 1938) and Morissette v. United States, 342 U.S. 246, 267-69 n. 28 (1952))(modified)

DEFENDANT'S REQUESTED INSTRUCTION 54
Taking of Property without Due Process Defined

The Constitution of the United States prohibits the taking of property without due process of law by virtue of state action. The taking must be intentional and with the further intent that the property not be returned. The taking cannot be negligent. An intentional taking is not a deprivation of due process, however, if there is what is called a post-deprivation remedy available.

Hudson v. Palmer, 468 U.S. 517, 533 (1984)

DEFENDANT'S REQUESTED INSTRUCTION 55
Deprivation of Property Without Due Process
Elements

The elements of taking property without due process are these:

1. The Defendant stole the property, here the money.

2. The defendant was acting under the color of state law.

3. The defendant acted intentionally and wilfully, knowing that his conduct violated the law.

4. The defendant did not act negligently.

5. There is no post-deprivation remedy available to the United States to retrieve its money, that is, a civil law suit.

Hudson v. Palmer, 468 U.S. 517, 533 (1984)(imposing the requirement that no alternative or remedy for the taking be available in law); United States v. Jackson, 235 F.2d 925, 927 (8th Cir. 1956)(setting out the elements); O'Malley et al, **Federal Practice and Instruction,** Sec. 29.03 (modified).

DEFENDANT'S REQUESTED INSTRUCTION 56
Constitutional Violation Defined by the Permanent, not the Temporal

The question that the jury must consider is whether or not the taking alleged deprived the citizens due process, i.e., whether a four hour time frame – between the moment the $6,000.00 was taken and then inventoried – constitutes a denial of due process. If you find that the delay here did not harm the citizens, that is to say prejudice them when it occurred beyond a reasonable doubt, then there is no constitutional violation proven.

See e.g. United States v. Pugh, 25 F.3d 669, 674 (8th Cir. 1994)(six-hour delay in presenting the defendant considered harmless); United States v. Czichray, 378 F.3d 822, 826 (8th Cir. 2004)(holding a defendant for seven hours in his house not a constitutional violation, when he was free to leave thereafter); United States v. Meyer, 609 F.2d 1247, 1251 (8th Cir. 1990)(failure to afford defendant a speedy trial is remedied by starting over, especially with in absence of prejudice)

DEFENDANT'S REQUESTED INSTRUCTION 58
Available Remedies in State Law

One of the elements for your consideration is the requirement that there are no alternative remedies available to the aggrieved party. In Minnesota, a private citizen may sue a State employee in a civil action and allege a loss caused by that employee.

Minn. Stat. 3.736; Parratt v. Taylor, 451 U.S. 527, 543-44 (1980)